MAHADEVI NADCHATIRAM

v.

THIRUCHELVASEGARAM MANICKAVASEGAR

COURT OF APPEAL, KUALA LUMPUR
AHMAD FAIRUZ JCA
DENIS ONG JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: W-02-113-2000]
28 APRIL 2001

TORT: *Defamation - Allegation of incest - Defence of justification - Whether proved*

TORT: *Defamation - Statements by counsel or party in the course of legal proceedings - Defence of absolute privilege - Whether to be applied without restriction*

TORT: *Defamation - Statements uttered by counsel in court when no proceedings in session - Whether absolute privilege may be relied upon*

TORT: *Defamation - Conspiracy - Whether to be considered separately - Whether common link or nexus found - Merger of tort of conspiracy with tort of defamation - Whether defence of absolute privilege applicable*

TORT: *Defamation - Communication by facsimile between firms - Publication to staff in the course of business - Whether defence of qualified privilege applicable*

TORT: *Defamation - Service of writ - Personal message written on service copy - Whether publication encompasses staff, court staff and judges - Whether defences of privilege, justification, fair comment and public interest may be relied on*

TORT: *Defamation - Statutory declaration - Allegation of coercion - Whether proved*

TORT: *Conspiracy - General damages awarded - Whether proper - Whether proof of actual damages required*

TORT: *Defamation - Award of damages - Principles applicable*

CIVIL PROCEDURE: *Pleadings - Defence to defamation - Failure to plead defence with precision - Whether fatal*

This appeal was in respect of two suits, namely; S5-23-08-99 ('Suit 08') and S2(S5)-23-04-07 ('Suit 04') wherein the learned judge gave judgment in part to the respondent/plaintiff ('Segaram') who alleged defamation and conspiracy by the appellant/defendant ('Mahadevi').

The principal cause of these two appeals and numerous other suits between these family members was the failure by the family to arrive at a settlement in respect of the distribution of the appellant's late father's estate. The respondent's wife, Vijay (the eldest sister of Mahadevi), had refused to execute a settlement agreement for distribution which led to civil suits being filed, one of which was suit No. 22-62-93 ('Suit 61') by Vijay and two others against the appellant and her siblings, Jega and Suseela. Suit 61 alleged that Jega had committed fraud and breach of trust in handling the deceased's estate. The respondent acted for Vijay under a power of attorney and alleged that he was blamed as the master-mind behind his wife's action. The respondent claimed that the appellant conspired with her siblings and his own daughter, Shanti, to defame him by accusing him of incest with the objective of forcing Vijay to consent to the settlement agreement and to withdraw Suit 61 and other suits against Jega and Suseela.

The respondent's action was founded on nine incidents of defamation and conspiracy by the appellant. The learned judge found the appellant liable in respect of the 3rd, 5th, 6th, 7th and 8th defamation and the tort of conspiracy and awarded the respondent a sum of RM2 million in damages for Suit 08, RM1 million for Suit 04 and RM500,000 for the tort of conspiracy in Suit 08 with costs of both suits. The court also granted permanent injunctions to restrain the appellant from repeating the defamatory materials. The appellant raised several defences including justification and absolute privilege.

Held:

Per Haidar Mohd Noor JCA

[1] The central issue was the truth or otherwise of the allegation of incest by the respondent's daughter, Shanti. It was in respect of the defence of justification. The learned judge had considered the oral evidence of Shanti and of other witnesses and concluded "that this claim of incest is not proved, even on the balance of probability". The learned judge gave six reasons for arriving at his conclusion. The court had given due consideration to them and see no reasons to disagree as the learned judge was the best person to observe and evaluate the evidence of the witnesses before him.

[2] The learned judge, after considering the authorities, emphasised on the need for the appellant to be precise and concise in her defences so as to prevent the element of surprise, which was the primary objective of pleadings. In the result he refused to entertain para 27 of her defence. The court agreed with his decision.

[3a] 1st and 2nd defamation

The respondent averred that both the appellant's written submissions in the hearing to strike out Suit 61 were published to the appellant's staff and her siblings. In respect of the written submission dated 11 October 1993, the learned judge ordered the alleged libel concerning the respondent both in Bahasa Malaysia and English be deleted and expunged whereas in regard to the written submission dated 1 November 1993, the Court of Appeal ordered that the whole of the said written submission be expunged and removed from the court file. This court agreed with the reasons and conclusion of the learned judge.

[3b] The court was of the view that if there was no restriction, that would amount to giving a counsel or party a carte blanche to make a defamatory statement of a person or party who had absolutely no connection with the proceedings before the court. Surely that could not be the position and with respect, the court disagreed with the learned judge on his view that there must be no restriction placed in the way of the principle.

[3c] On the facts, it was clear that the appellant's written submissions were related to resisting Suit 06 in which the appellant claimed that it was initiated by the respondent's wife at the instigation of the respondent. In the circumstances, the court agreed with the learned judge's finding that however defamatory the contents of those written submissions (some of which tended to go overboard) of the respondent might be, they were protected by absolute privilege. In view of that, the cross-appeal by the respondent failed.

[4] 3rd defamation

The learned judge found as a fact that when the appellant uttered the alleged defamation on 12 October 1993 at the court house at the Seremban High Court, that court at the material time was not in session and the learned judge was in his chambers conducting chamber proceedings. Hence those words were not uttered in the course of legal proceedings. The court was of the view that the learned judge was the best person to evaluate the evidence of both parties before him and was in no position to disagree or quarrel with his evaluation. The court also

agreed with the learned judge's further view that the proposition must include situations where the defamation is made in a court room when no proceedings are in session which was the case here.

[5] 4th defamation

The learned judge was of the view that this 4th defamation which arose out of a letter dated 12 November 1993 written by Jega to Vijay's solicitor, was more for the tort of conspiracy rather than defamation. He therefore considered conspiracy separately in his judgment.

The court disagreed with the learned judge's view that the 4th defamation was more for the tort of conspiracy. Firstly, the letter was written by Jega and there was no evidence to show that it was written at the instigation of the appellant. There was therefore no nexus. Secondly, looking at the letter even if at the instigation of the appellant, it was a notice to the solicitor for the opposing party that certain witnesses, including the nature of their evidence to be adduced, would be called at the pending proceedings filed by the respondent's wife. Such case would come within the same situation as in the 1st and 2nd defamation, *ie*, absolute privilege was available as a defence. It was one of the defences open to the appellant in view of the principle that the tort of conspiracy merges with that of the tort of defamation.

[6] 5th defamation

The court accepts the finding of fact by the learned judge that it was the appellant who sent the letter dated 2 September 1995 *via* facsimile to the respondent's firm and that the said letter was read by the respondent's staff. The learned judge failed to consider that it was a communication between the appellant's firm and the respondent's firm as contended by the appellant and was in the ordinary course of business and publication to the respondent's staff including PW5 would come within 'ancillary' qualified privilege.

[7] 6th defamation

The 6th defamation was in respect of the remarks endorsed on the letter of the respondent dated 5 September 1995 demanding an apology from the appellant and withdrawal of the offending words in her letter of 2 September 1995 to the respondent's firm. The learned judge held the appellant liable on the basis of publication to the staff of the respondent. As the court held that such publication would properly come under privilege publication and non-actionable, the respondent failed on this 6th defamation and the learned judge's decision could not be upheld.

[8] 7th defamation

After the sealed copy of the writ in Suit 04 was extracted, PW5 served it on the appellant. Instead of the normal practice of affixing her signature at the rear of the service copy, the appellant wrote and while writing, read aloud to her staff present a message to the respondent. The court accepted the learned judge's finding that the publication therein was not only made to the staff of the respondent but extended to the judges, etc. for the reasons stated by him. Therefore, the defence of privileged publication did not extend to the appellant under this 7th defamation. The court further agreed that the defences of justification, fair comment and public interest did not cover the appellant's liability to the respondent for the libel. Those words had nothing to do with the writ served on her.

[9] 8th defamation

In response to the statement published in respect of the 7th defamation, the respondent through his solicitor wrote a letter dated 24 February 1997 to the appellant personally to demand withdrawal of the said statement and to apologise which was personally served by PW5. The appellant wrote a message to the respondent and while writing, read it out loud in the presence of her staff, Shanti and PW5. The court agreed with the learned judge's acceptance of the evidence of PW5 of what transpired. However, the learned judge only considered the defence of fair comment. In the court's view, the learned judge should have considered that the publication was made to PW5 and the respondent's solicitors and it was and should be under the ordinary course of business in which case privileged publication was available to the appellant and hence it was non-actionable. In the circumstances, the learned judge erred in his finding and the court ruled in the appellant's favour.

[10] 9th defamation

The respondent alleged that the statutory declaration dated 4 May 1994 made by Shanti was falsely and maliciously "prepared, dictated and approved" by the appellant in collusion with Jega. The learned judge found that the appellant did not direct Shanti to make the statutory declaration nor did she force Shanti to affirm such statutory declaration. There were no grounds for the court to disagree with his finding and conclusion. Therefore, the respondent failed in his cross appeal on the 9th defamation.

[11] Conspiracy

Following *Ward v. Lewis* and adopted by the learned judge in *MGG Pillai v. Tan Sri Vincent Tan Chee Yioun* and affirmed by the court, the court was of the view that the learned judge erred in law in considering the tort of conspiracy separately. The other essential point that the learned judge missed was that actual damage was an essential ingredient in the tort of conspiracy. The learned judge awarded a sum of RM500,000 to the respondent under the tort of conspiracy for damage to "the plaintiff's profession". In other words, the award was for general damages for injury to reputation – which is not permissible in a claim for the tort of conspiracy. The court agreed with the appellant's submission that the respondent produced no evidence of such loss. In the circumstances, the court could not agree with the learned judge's finding and conclusion including the award of RM500,000.

[12] The court affirmed the order of the learned judge dismissing the 1st, 2nd and 9th defamation and holding the appellant liable for the 3rd and 7th defamation. The order of the learned judge in respect of the 5th, 6th and 8th defamation as well as the tort of conspiracy (including the award of RM500,000) was set aside. The court further ordered that the 4th defamation failed.

[13] In considering the award of damages for defamation, the court was guided by the long established factors as set out by the Federal Court in *MGG Pillai*'s case. The extent of the publication was one of the relevant factors. In this case, the defamation was confined to a small circle of people, *ie*, the court staff and those present in the Seremban High Court. It was not a publication to the world at large. Taking into account the circumstances of the case, the court would make an award of RM500,000 as damages to the respondent in respect of the 3rd and 7th defamation. That figure was sufficient to compensate the respondent for the damage caused and he had been fully vindicated by the decision of the court on the alleged incest by him on his daughter. The order of the learned judge in respect of the damages was hereby set aside and substituted with a sum of RM500,000. Costs of this appeal and the other two appeals and the two applications relating to this appeal to the respondent. Deposits to the respondent toward taxed costs. The costs of the cross-appeal to the appellant.

[Appellant's appeal allowed in part; respondent's cross appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Rayuan ini adalah berhubung dua guaman yang disatukan, iaitu S5-23-08-99 ('Guaman 08') dan S2(S5)-23-04-07 ('Guaman 04') di dalam yang mana hakim yang bijaksana telah memberikan penghakiman sebahagiannya kepada responden/plaintif ('Segaram') yang mendakwa fitnah dan konspirasi oleh perayu/defendan ('Mahadevi').

Sebab utama kedua-dua rayuan ini serta guaman-guaman lain yang banyak antara ahli-ahli keluarga ini adalah kerana kegagalan oleh keluarga tersebut untuk mencapai suatu penyelesaian berhubung dengan pembahagian harta pesaka mendiang bapa perayu. Isteri responden, Vijay (kakak Mahadevi), telah menolak untuk menyempurnakan satu perjanjian penyelesaian untuk pembahagian yang telah membawa kepada guaman-guaman sivil yang difailkan, salah satu daripadanya adalah guaman No. 22-62-93 ('Guaman 61') oleh Vijay dan dua yang lain terhadap perayu dan adik-adiknya, Jega dan Suseela. Guaman 61 mendakwa bahawa Jega telah melakukan fraud dan pecah amanah dalam mengendalikan harta pesaka simati. Responden telah bertindak bagi pihak Vijay di bawah satu surat kuasa wakil dan mendakwa bahawa beliau telah dipersalahkan sebagai perancang di sebalik tindakan isteri beliau. Responden menuntut bahawa perayu telah berkomplot dengan adik-adiknya dan anak perempuannya sendiri, Shanti, untuk memfitnah beliau dengan menuduh beliau melakukan inses dengan tujuan untuk memaksa Vijay memberikan persetujuan kepada perjanjian penyelesaian tersebut dan menarik-balik Guaman 61 itu dan guaman-guaman lain terhadap Jega dan Suseela.

Tindakan responden telah diasaskan pada 9 insiden memfitnah dan konspirasi oleh perayu. Hakim yang bijaksana mendapati perayu bertanggungan bagi fitnah Ke-3, Ke-5, Ke-6, Ke-7 dan Ke-8 dan tort konspirasi dan mengawardkan responden satu jumlah sebanyak RM2 juta bagi gantirugi untuk Guaman 08, RM1 juta untuk Guaman 4 dan RM500,000 untuk tort konspirasi dalam Guaman 08 dengan kos bagi kedua-dua guaman tersebut. Mahkamah telah juga memberikan injunksi tetap untuk menghalang perayu daripada mengulangi bahan-bahan fitnah itu. Perayu telah membangkitkan beberapa pembelaan termasuk justifikasi dan perlindungan mutlak.

Diputuskan:
Oleh Haidar Mohd Noor JCA

[1] Isu yang terpenting adalah kebenaran atau sebaliknya dakwaan inses oleh anak perempuan responden, Shanti. Ianya adalah berhubung dengan pembelaan justifikasi. Hakim yang bijaksana telah mempertimbangkan keterangan lisan Shanti dan saksi-saksi lain dan memutuskan "that this claim of incest is not proved, even on the balance of probability." Hakim

yang bijaksana memberikan enam alasan bagi keputusan beliau itu. Mahkamah telah memberikan pertimbangan kepada mereka dan tidak dapat melihat sebarang alasan untuk tidak bersetuju, oleh kerana hakim yang bijaksana adalah orang yang sesuai untuk memerhati dan menilai keterangan saksi-saksi di hadapan beliau.

[2] Hakim yang bijaksana, setelah mempertimbangkan otoriti-otoriti tersebut, menekankan mengenai perlunya perayu memberikan pembelaan yang tepat dan ringkas supaya menghalang unsur mengejut yang mana adalah bantahan utama pliding-pliding. Akibatnya beliau enggan melayan perenggan 27 pembelaan perayu. Mahkamah bersetuju dengan keputusan beliau.

[3a] Fitnah Pertama dan Ke-2

Responden menegaskan bahawa kedua-dua penghujahan bertulis perayu dalam perbicaraan untuk membatalkan Guaman 61 telah diterbitkan kepada kakitangan perayu dan adik-adiknya. Berhubung penghujahan bertulis bertarikh 11 Oktober 1993, hakim yang bijaksana memerintah libel yang didakwa berhubung responden dalam Bahasa Malaysia dan Bahasa Inggeris dikeluarkan dan dihapuskan sedangkan berhubung penghujahan bertulis bertarikh 1 November 1993, Mahkamah Rayuan memerintahkan supaya keseluruhan penghujahan bertulis tersebut dihapuskan dan dikeluarkan daripada fail mahkamah. Mahkamah ini bersetuju dengan alasan-alasan dan keputusan hakim yang bijaksana.

[3b] Mahkamah berpendapat bahawa jika tiada sekatan, itu akan membawa kepada memberikan peguam atau pihak tersebut satu *carte blanche* untuk membuat pernyataan memfitnah mengenai orang atau pihak yang sesungguhnya tiada kaitan dengan prosiding di hadapan mahkamah. Tentu ini bukan kedudukannya dan dengan segala hormatnya mahkamah tidak bersetuju dengan hakim yang bijaksana mengenai pandangan beliau bahawa tidak mesti ada sekatan tersebut.

[3c] Menurut fakta, ianya adalah jelas kepada kami bahawa penghujahan bertulis perayu adalah berkaitan dengan menentang Guaman 06 di mana perayu menuntut bahawa ianya dimulakan oleh isteri responden atas hasutan responden. Dalam keadaan tersebut, mahkamah bersetuju dengan keputusan hakim yang bijaksana bahawa bagaimana memfitnah sekalipun kandungan penghujahan bertulis itu (sebilangan daripadanya melampau) terhadap responden, mereka dilindungi oleh perlindungan mutlak. Memandangkan keadaan ini, rayuan bersaling responden gagal.

[4] Fitnah Ke-3

Hakim yang bijaksana mendapati pada hakikatnya bahawa ketika perayu menyebut fitnah yang didakwa itu pada 12 Oktober 1993 dalam mahkamah di Mahkamah Tinggi Seremban, mahkamah itu, pada waktu berkenaan, tidak bersidang dan hakim yang bijaksana sedang berada dalam kamar beliau mengendalikan prosiding kamar. Oleh itu perkataan-perkataan itu telah tidak disebut ketika perjalanan prosiding guaman. Mahkamah ini berpendapat bahawa hakim yang bijaksana adalah orang yang sesuai untuk menilai keterangan kedua-dua pihak di hadapan beliau dan mahkamah tidak berada dalam kedudukan untuk tidak bersetuju atau mempertikaikan penilaian beliau. Mahkamah juga bersetuju dengan pandangan lanjut hakim yang bijaksana bahawa proposisi tersebut mestilah memasukkan situasi-situasi di mana fitnah tersebut dibuat dalam sesebuah mahkamah ketika tiada prosiding seperti di dalam kes ini.

[5] Fitnah Ke-4

Hakim yang bijaksana berpendapat bahawa fitnah Ke-4 ini yang berbangkit daripada sepucuk surat bertarikh 12 November 1993 yang ditulis oleh Jega kepada peguamcara Vijay, adalah lebih kepada tort konspirasi daripada fitnah. Beliau dengan itu mempertimbangkan konspirasi secara berasingan dalam penghakimannya.

Mahkamah ini tidak bersetuju dengan pandangan hakim yang bijaksana bahawa fitnah Ke-4 adalah lebih kepada tort konspirasi. Pertamanya, surat tersebut telah ditulis oleh Jega dan tiada keterangan untuk menunjukkan bahawa ianya telah ditulis atas hasutan perayu. Tidak terdapat apa-apa hubungan juga. Keduanya, melihat surat tersebut meskipun jika atas hasutan perayu, ianya merupakan satu notis kepada peguamcara untuk pihak yang menentang bahawa saksi-saksi tertentu, termasuk sifat keterangan mereka yang akan dikemukakan, akan dipanggil di prosiding yang sedang menanti penyelesaian yang difailkan oleh isteri responden. Kes sedemikian akan terlingkung di dalam situasi yang sama dengan fitnah pertama dan ke-2, iaitu, perlindungan mutlak tersedia ada sebagai pembelaan. Ianya adalah salah satu pembelaan yang terbuka kepada perayu memandangkan prinsip bahawa tort konspirasi bercantum dengan tort fitnah.

[6] Fitnah Ke-5

Mahkamah menerima keputusan fakta hakim yang bijaksana bahawa ianya merupakan perayu yang mengirimkan surat bertarikh 2 September 1995 melalui faksimili kepada firma responden dan bahawa surat tersebut telah dibaca oleh kakitangan responden. Hakim yang bijaksana gagal

mempertimbangkan bahawa ianya adalah suatu komunikasi antara firma perayu dan firma responden sepertimana yang ditegaskan oleh perayu dan adalah menurut perjalanan perniagaan biasa serta penerbitan kepada kakitangan responden termasuk PW5 di bawah perlindungan bersyarat "ancilliary".

[7] Fitnah Ke-6

Fitnah Ke-6 adalah berhubung kenyataan di dalam surat responden bertarikh 5 September 1995 yang menuntut supaya responden meminta maaf dan menarik balik perkataan-perkataan memfitnah di dalam suratnya bertarikh 2 September 1995 kepada firma responden. Hakim yang bijaksana mendapati perayu bertanggungjawab atas penerbitan kepada kakitangan responden. Oleh kerana mahkamah memutuskan penerbitan yang sedemikian dilindungi dan tidak boleh diambil tindakan, maka responden gagal atas fitnah ke-6 ini dan keputusan hakim yang bijaksana tidak boleh dipertahankan.

[8] Fitnah Ke-7

Selepas salinan writ yang telah dimeterai dalam Guaman 04 dikeluarkan, PW5 menyampaikannya ke atas perayu. Selain daripada amalan biasa menurunkan tandatangan beliau pada belakang salinan penyampaian, perayu telah menulis dan ketika menulis membaca dengan kuatnya kepada kakitangannya yang hadir satu pesanan kepada responden. Mahkamah menerima keputusan hakim yang bijaksana bahawa penerbitan di dalamnya bukan sahaja dibuat kepada kakitangan responden tetapi berlanjutan kepada hakim-hakim dan lain-lain atas alasan-alasan yang dinyatakan oleh beliau. Oleh itu, pembelaan penerbitan perlindungan tidak terpakai di sini. Mahkamah selanjutnya bersetuju bahawa pembelaan-pembelaan justifikasi, komen berpatutan dan kepentingan awam tidak melindungi tanggungan perayu kepada responden untuk libel. Perkataan-perkataan tersebut tiada kena-mengena dengan writ yang disampaikan ke atas perayu.

[9] Fitnah Ke-8

Bagi menjawab penyataan yang diterbitkan berhubung dengan fitnah ke-7, responden melalui peguamcaranya telah menulis surat bertarikh 24 Februari 1997 kepada perayu dengan sendirinya untuk menuntut penarikan balik penyataan tersebut dan untuk meminta maaf yang mana telah disampaikan sendiri oleh PW5. Perayu telah menulis kepada responden dan ketika menulis membacanya dengan kuat dalam kehadiran kakitangannya, Shanti dan PW5. Mahkamah bersetuju dengan penerimaan hakim yang bijaksana akan keterangan PW5 mengenai apa yang telah

berlaku. Namun demikian, hakim yang bijaksana tersebut hanya mempertimbangkan pembelaan komen berpatutan. Menurut pandangan mahkamah, hakim yang bijaksana seharusnya mempertimbangkan bahawa penerbitan tersebut telah dibuat kepada PW5 dan peguamcara responden dan ianya telah dan haruslah di bawah perjalanan perniagaan yang biasa dalam keadaan yang mana penerbitan perlindungan tersedia ada untuk perayu dan dengan itu ianya tidak boleh diambil tindakan. Dalam keadaan tersebut, hakim yang bijaksana tersalah dalam keputusan beliau dan mahkamah membuat keputusan yang memihak kepada perayu.

[10] Fitnah Ke-9

Responden mendakwa bahawa akuan berkanun bertarikh 4 Mei 1994 oleh Shanti telah secara palsu dan dengan niat jahat di "prepared, dictated and approved" oleh perayu dengan pakatan bersama Jega. Hakim yang bijaksana mendapati bahawa perayu tidak mengarahkan Shanti supaya membuat akuan berkanun tersebut mahupun memaksa Shanti supaya mengikrarkan akuan berkanun yang sedemikian. Tiada alasan bagi mahkamah untuk tidak bersetuju dengan keputusan dan kesimpulan beliau. Oleh itu, responden gagal dalam rayuan bersalingnya tarhadap fitnah ke-9.

[11] Konspirasi

Mengikut *Ward v. Lewis* dan diterima-pakai oleh hakim yang bijaksana dalam *MGG Pillai v. Tan Sri Vincent Tan Chee Yioun* dan dimengesahkan oleh mahkamah ini, mahkamah ini berpendapat bahawa hakim yang bijaksana tersalah pertimbangan di sisi undang-undang dalam mempertimbangkan tort konspirasi secara berasingan. Perkara penting yang tertinggal oleh hakim yang bijaksana adalah bahawa gantirugi sebenarnya merupakan bahan yang penting dalam tort konspirasi. Hakim yang bijaksana memberikan jumlah sebanyak RM500,000 kepada responden di bawah tort konspirasi untuk gantirugi kepada "the plaintiff's profession". Dalam ertikata yang lain, award tersebut adalah untuk gantirugi am bagi kemudaratan kepada reputasi – yang mana tidak dibenarkan dalam tuntutan bagi tort konspirasi. Mahkamah bersetuju dengan penghujahan perayu bahawa responden tidak mengemukakan keterangan bagi kerugian yang sedemikian. Dalam keadaan tersebut, mahkamah tidak boleh bersetuju dengan keputusan dan kesimpulan hakim yang bijaksana termasuk award sebanyak RM500,000.

[12] Mahkamah mengesahkan perintah hakim yang bijaksana yang menolak fitnah pertama, ke-2 dan ke-9 dan dalam memutuskan perayu bertanggungan bagi fitnah ke-3 dan ke-7. Perintah hakim yang bijaksana berhubung fitnah ke-5, ke-6 dan ke-8 dan juga tort konspirasi (termasuk award sebanyak RM500,000) diketepikan. Mahkamah selanjutnya memerintahkan bahawa fitnah ke-4 gagal.

[13] Dalam mempertimbangkan award gantirugi untuk fitnah, mahkamah dibimbing oleh faktor-faktor yang telah lama ditetapkan sepertimana yang dibentangkan oleh Mahkamah Persekutuan di dalam kes *MGG Pillai.* Takat penerbitan adalah salah satu dari faktor-faktor yang relevan. Dalam kes ini, fitnah tersebut terhad kepada suatu lingkungan orang yang kecil, iaitu kakitangan mahkamah dan mereka yang hadir dalam Mahkamah Tinggi Seremban. Ianya bukan suatu penerbitan ke keseluruh dunia. Mengambilkira keadaan kes tersebut, mahkamah akan membuat award sebanyak RM500,000 sebagai gantirugi kepada responden berhubung fitnah ke-3 dan ke-7. Angka itu mencukupi sebagai pampasan kepada responden bagi kemudaratan yang disebabkan dan beliau telah dibenarkan sepenuhnya oleh keputusan mahkamah mengenai inses yang didakwa beliau melakukan ke atas anak perempuannya. Perintah hakim yang bijaksana berhubung gantirugi adalah dengan ini diketepikan dan digantikan dengan jumlah sebanyak RM500,000. Kos rayuan ini dan dua rayuan yang lain serta dua permohonan berhubung dengan rayuan ini kepada responden. Deposit kepada responden kepada kos ditetap. Kos rayuan bersaling kepada perayu.

[Rayuan perayu dibenarkan sebahagiannya; rayuan bersaling responden ditolak dengan kos.]

Case(s) referred to:

Bryanston Finance Ltd v. de Vries [1975] 2 All ER 609 ***(foll)***
Dashtgard v. Blair [1990] CCLT (2nd) 284 ***(refd)***
Demopolis v. Peoples National Bank 769 p 2nd 426 (Wash 1990) ***(refd)***
Duke of Brunswick v. Harmer [1849] 14 QB 185 ***(dist)***
Fusing Construction Sdn Bhd v. EON Finance Bhd & Ors And Another Appeal [2000] 3 CLJ 341 ***(refd)***
Gregory v. Portmouth Council [2000] 1 All ER 560 ***(foll)***
Gulf Oil Ltd v. Page [1987] 1 Ch 327 ***(refd)***
Hassan & Anor v. Wan Ishak & Ors [1961] 27 MLJ 45 ***(refd)***
Kennedy v. Hilliard 10.10 I, CL Rep (NS) 195 ***(refd)***
Lawson v. Burns [1976] 6 WLR 369 ***(foll)***
Lincoln v. Daniels [1962] 1 QBD 237 ***(refd)***
Lourho v. Fayed (No 5) [1993] 1 WLR 1489 ***(refd)***
MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [1995] 2 CLJ 912 ***(foll)***
Muster v. Lamb [1883] 1 QBD 588 ***(refd)***

Osboru v. Thomas Boulter [1930] 2 KB 226 ***(refd)***
R v. Paine [1696] 5 Mod 167 ***(foll)***
Rahim Badhas v. Bacha Call [1929] AIR 214 ***(foll)***
Rex v. Skinner [1772] Lofft 55 ***(refd)***
Royal Acquarium v. Parkinson [1982] 1 QB 431 ***(refd)***
Ward v. Lewis [1955] 1 All ER 55 ***(foll)***
Watson v. M'Ewan [1905] AC 480 ***(dist)***

Other source(s) referred to:
Halsbury's Laws of England, 4th edn (reissued), vol 28, paras 64, 118
Libel and Slander, Gatley, 9th edn, paras 13.3, 32.13

For the appellant - KS Narayanan (Saranjit Singh & Mahadevi Nadchatiram with him); M/s Mahadevi Nadchatiram & Partners
For the respondent - Malik Imtiaz Sarwar (Robert Low & Karina Yong with him); M/s M Segaram & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit Nos: S5-23-08-97 & S2(S5)-23-04-97]

Reported by Cindy Chan

JUDGMENT

Haidar Mohd Noor JCA:

At the hearing of appeal No. W-02-113-2000 by the appellant (defendant), Mahadevi a/p Nadchatiram ("Mahadevi"), there are two other appeals namely, W-02-552-99 and W-02-606-99 filed by her for hearing also and which are related to appeal No. W-02-113-2000.

Appeal No. W-02-113-2000 is in respect of two suits namely, S5-23-08-99 and S2(S5)-23-04-97 which were consolidated. The learned judge gave judgment in part in favour of the respondent/plaintiff, Thiruchelvasegaram a/l Manickavasegar ("Segaram"). There is a cross-appeal filed by the respondent. The consolidated suits involve primarily the cause of action of defamation.

In respect of appeal No. W-02-552-99, the application of Mahadevi to re-re-re amend her re-re amended statement of defence dated 18 September 1998 in suit No. S2(S5)-23-04-l997 was dismissed by the senior assistant registrar. On appeal to the judge in chambers, the appeal (encl. 105) was dismissed with costs on 6 July 1999. Hence this appeal before us.

In respect of appeal No. W-02-606-99, a fresh application was filed by Mahadevi to re-re-re amend her re-re amended statement of defence dated 18 September 1998 in suit No. S2(S5)-23-04-97 (encl. 112) direct to the learned

judge but it was dismissed with costs by the learned judge on 26 July 1999. Hence this appeal before us.

It was unfortunate that before these two appeals could be heard by this court, the main action in the consolidated suits was heard and disposed of by the learned judge on 22 January 2000. We intimated to counsel for Mahadevi that in view of the disposal of the main action, would his client still wish to pursue with these two appeals. He was good enough to withdraw the two appeals with the consent of counsel for Segaram and that the costs to follow the event of appeal No. W-02-113-2000.

In addition thereto, there are two motions filed, namely encl. 10a and encl. 14a.

Enclosure 10a is filed by Segaran praying for leave to raise additional grounds to the notice of cross-appeal as stated in the motion with costs to abide by the result of the appeal. Counsel for Mahadevi has no objection and we gave order in terms of encl. 10a.

Enclosure 14a is filed by Mahadevi praying for leave:

(1) to amend Mahadevi's notice of appeal dated 16 February 2000 annexed as exh. "A";

(2) to adduce evidence at the hearing of the appeal by producing the following documents:

(a) notes of proceedings in the Kuala Lumpur High Court Civil Suit No. S5-23-88-97 consolidated with Civil Suit No. S2(S5)-23-04-97 of 9 December 1999, 22 January 2000 and 25 March 2000.

(b) the police report of Vijayalakshmi Devi a/p Nadchatiram made on 22 September 1989;

(c) the police report dated 23 January 1998 made by Aaron Inderaj VS Sundram and the doduments in respect of Seremban Magistrate's Court Summons No. 85-216-98.

(3) the documents set out in prayer (2) above be included in a further supplementary record of appeal and filed in this appeal;

(4) costs of the application be costs in the cause.

By consent, counsel for Segaram has no objection to prayers (1) and (2) (a) and counsel for Mahadevi withdrew prayers (2) (b) and (c) with prayer (3) to be amended accordingly. We then made order in terms as amended of encl 14a.

Having disposed of the preliminaries, we now proceed to consider appeal No. W-02-113-2000.

For ease of reference, we shall refer to suit No. S5-23-08-97 as "suit 08" and suit No. S2(S5)-23-04-97 as "suit 04" in line with what the learned judge did in his judgment.

Background

The parties in suit 08 and suit 04 are the same, that is, Segaram as the plaintiff and Mahadevi as the defendant. This defamatory action, we must say, is rather unfortunate as it involves family members. Segaram is the brother-in-law of Mahadevi as he is married to Mahadevi's eldest sister, Vijayalakshmi Devi ("Vijay"). Segaram and Mahadevi are both advodates and solicitors of the High Court, Malaya.

As stated by the learned judge, it is in fadt undisputed by all, that the principal cause of all the differences between these family members which started these two actions under appeal before us and numerous others, is the distribution of wealth – properties left behind by the patriarch – Nadchatiram s/o Muthucumaru (deceased), the father of the appellant. There were attempts to settle the deceased's estate property among his surviving children but unfortunately failed thereby leading to a series of suits by the siblings against each other. Much of the allegations in these two actions are borne out of these contested suits.

According to the learned judge, the undisputed evidence before him was that Vijay had refused to execute a settlement agreement for the distribution of the deceased's estate property. It then led to the filing of civil suits in the Seremban High Court, one of which is suit No. 22-61-93 ('suit 61') by Vijay and two others against the appellant, Jegadevan a/l Nadchatiram ("Jega") and Suseela Devi ("Suseela") (the brother and sister of the appellant respectively). Suit 61 alleges, *inter alia*, Jega had committed fraud and breach of trust in handling the deceased's estate property. The respondent acted for his wife, Vijay, through a power of attorney given under her hand. The respondent alleged that he was blamed as the master-mind behind the actions of Vijay (possibly by virtue of their relationship as husband and wife). The respondent claims that the appellant conspired with Jega, Saraswathy (another sister of the appellant) and his own daughter, Shanti to defame him. It seemed the objective was and is to force Vijay to consent to the estate property settlement and to withdraw suit 61 as well as other suits against the appellant, Jega and Suseela. As stated by the learned judge, the sting of the defamation is – incest by the respondent on his own daughter, Shanti.

From the amended statement of claim, the respondent's action is founded on 9 (nine) defamation and a conspiracy by the appellant. The learned judge found the appellant liable for the 3rd, 5th, 6th, 7th and 8th defamation as well as the tort of conspiracy. The other prayer for permanent injunctions to restrain the appellant from repeating the defamatory materials in both suits were also granted. The counter-claim of the appellant in suit 08 was struck off with costs as according to the learned judge the appellant confirmed in the open court before him that she was not pursuing it.

The learned judge after giving due consideration to the factors governing general damages and guided by the principles enunciated in *MGG Pillai v. Tan Sri Dato Vincent Tan Chee Yioun* [1995] 2 CLJ 912 made the following award:

(a) for suit 08, damages to the respondent of a sum of RM2 million for defamation;

(b) for suit 04, damages to the respondent of a sum of RM1 million for defamation;

(c) for tort of conspiracy in suit 08, a sum of RM500,000.

The respondent was awarded costs in respect of both suits.

We will for convenience in considering this appeal follow what the learned judge adopted in his judgment, that is, a chronological approach rather than those as set out by the respondent in his amended statement of claim.

Before considering the various heads of the defamation including conspiracy and the defences relied on by the appellant as decided by the learned judge, the central issue that would effectively assist in determining them, in our view, is the truth or otherwise of the allegation of incest by the respondent on his daughter, Shanti. It is more so in respect of the defence of justification. As did the learned judge, we will proceed to consider the defence of justification first.

Justification

In this respect, the learned judge had donsidered the oral evidence of Shanti with that of the other witnesses regarding the alleged incest and he concluded thus:

> After careful perusal of all the relevant evidence and having the opportunity to observe the demeanour of the witnesses I come to the conclusion that this claim of incest is not proved, even on the balance of probability.

The learned judge gave six reasons in arriving at his conclusion. We need not repeat them here as he had given detailed reasons in his written judgment. We have given due consideration to them and we see no reasons to disagree. The learned judge, in our view, is the best person to observe and evaluate the evidence of the witnesses before him. We, sitting as the appellate court, do not have that advantage and should be slow to disturb his finding (*Fusing Construction Sdn. Bhd. v. EON Finance Berhad & 2 Ors (And Another Appeal)* [2000] 2 AMR 226).

The learned judge also touched on para. 27 of the appellant's amended statement of defence in which he expressed his utmost indignation as it is a generalised form of pleading. The paragraph is worded thus:

> The defendant relies on all the defences to defamation such as fair comment, absolute and qualified privilege, justification and whenever she has overlooked to insert these defences she will invoke the defences as her defence that may be applicable to the various paragraphs wherever relevant since the plaintiff's statement of claim is a bit messy and should have pleaded and sued each defamation in a separate suit.

The above paragraph can properly be described as a catch all paragraph.

The learned judge, after considering the authorities, emphasised on the need for the appellant to be precise and concise in her defences so as to prevent the element of surprise, which is the primary objective of pleadings. In the result he refused to entertain para. 27 of her defence. We agree with his decision.

Regrettably a lot of arguments were put forth on the facts/issues that were not pleaded, were allegedly put forward again to the court. For the purpose of this appeal, we would go by what the learned judge considered them as he would be the best person to do so.

We will now proceed to consider the various alleged defamation and the defences put forward by the appellant before the learned judge.

1st And 2nd Defamation

The 1st and 2nd defamation can be dealt with together as they relate to the written submissions to the learned judge concerning suit 61 and the common issue is whether the appellant is covered by absolute privilege.

In respect of the defamation, the appellant acting for herself, Jega and Suseela as defendants in suit 61 when applying for them to be struck out as defendants handed in a written submission to the High Court on 11 October 1993, the day of the hearing of the striking out. The words complained of are as stated in para. 10.1 of the further re-amended statement of claim:

> ... If ever these proceedings were instituted it was done by Thiruchelvasegaram, the First Plaintiff's husband, for he has been deprived of his daughter with whom he has intensely in love and the daughter cannot stand or bear his sight. Even recently, he requested as a precondition to withdraw all cases and send a message through the Second Plaintiff to the Second Defendant that his daughter be sent back.
>
> ... The First Plaintiff's husband is a slimy creep and an incestuous bastard for having been caned by the First Defendant (Jega) for his immoral activities against his daughter he is now using the Court as a medium to take revenge against the First Defendant. Should the Court waste time unnecessarily? The poor child how much mental agony she has undergone? Believe me my Lord this is the truth.

The Bahasa version is:

> ... Jika prosiding ini dibawa ia telah dibawa oleh Thiruchelvasegaram, suami Plaintiff Pertama, sebab dia tidak mempunyai anaknya yang dia sayang dan anaknya tidak sukanya. Baru-baru ini dia minta sebagai syarat lebih dahulu, untuk menarik-balik semua kes, melalui Plaintif Kedua kepada Defendan Kedua bahawa anaknya dihantar balik.
>
> Suami Plaintiff Pertama adalah seorang kekam dan seorang sumbang kadim yang dilahir luar nikah dan telah dipukul oleh Defendan Pertama oleh kerana kelakuan tidak baiknya terhadap anaknya dan oleh itu menggunakan Mahkamah ini untuk membalas dendam terhadap Defendan Pertama. Patutkah Mahkamah ini membazir masa? Kasihan anak itu yang mengalami banyak penderitaan? Percaya saya Yang Arif ini adalah benar.

When the respondent's wife, Vijay, applied to strike out the alleged libellous statements set out in the written submission dated 11 October 1993, both the Bahasa Malaysia and the English Language texts, the appellant submitted another written submission dated 1 November 1993 to the court with copies extended to Messrs Satha & Subra. The words complained of are as stated in para. 10.6 of the further re-amended statement of claim:

> ... The allegations against M. Thiruchelvasegaram is justifiable. He is the mastermind to institute all these proceedings against the 1st Defendant who gave him a good whacking for having molested and trying to commit incest with his daughter. The daughter herself has filed proceedings against the father. If there was no truth in it she being an advocate and solicitor, having knowledge of the law and given Western education and being a very intelligent and brilliant member of the Bar who qualified at the age of 21 would not make such serious allegation against her own father if there was no truth in it.

... My Lord in the above paragraphs we have clearly explained the facts in issue for the root of all these proceedings was because M. Thiruchelvasegaram's daughter sometime in 1980 complained to the First Defendant that while she was an infant her father tried to sexually assault her. The First Plaintiff's affections towards her was questionable. Actually in 1989 she did lodge a police report in Shah Alam Police Station and in the original copy of the Police Report she wrote "incest" in the report and the Second Defendant felt sorry for the First Plaintiff who was begging and crying with her "Please don't land my husband into trouble" and deleted from the original copy of the Police Report the word "incest" written. The Second Defendant loves the First Plaintiff very much though the First Plaintiff's own daughter wanted the father to be charged slowly spoke round the First Plaintiff's daughter and withdrew the complaint. The Second Defendant wanted the First Plaintiff to live with her husband happily but unfortunately M. Thiruchelvasegaram was not satisfied and on other occasions according to his daughter when the First Plaintiff was overseas has repeated his action.

... My Lord, how much because of this the whole family has undergone mentally. A name which was earned by the late Mr. Nadchatiram was destroyed by M. Thiruchelvasegaram due to lust of the flesh of his own daughter. Excessive parental love could turn to lust.

... Whereas my Lord in this case the allegations of incest are not scandalous. They are facts in issue of First Plaintiff's husband who is the instrumentor of bringing the proceedings against the First Defendant. If any of the beneficiaries really thought that there was fraud why should they wait 21 years. Most of the beneficiaries are professionals well versed with the law. They could have brought it earlier. The root cause was the incestuous relationship confirmed by the daughter. Therefore none of the above paragraphs should be expunged.

... There are a multiciplity of cases before Your Lordship. All was instrumented by M. Thiruchelvasegaram to take revenge against the First Defendant for the caning he had received. Must the Court waste time just because one person due to vicious nature has instigated persons and taking advantage of the First Plaintiff's unstable mental condition and filing so many proceedings.

... the Third Plaintiff is a victim of M. Thiruchelvasegaram's favours a mastermind who has used the Third Plaintiff against the First Defendant successfully in order to gratify his revenge against the First Defendant.

... My Lord, at this preliminary stage M. Thiruchelvasegaram is trying to get the Third Plaintiff to expunge all these allegations. In actual fact, M. Thiruchelvasegaram is worried that his incestuous act has come out into the light. He is trying to expunge this as scandalous when it is actually a fact in issue because he is scared his dirty behaviour if this matter goes on appeal to the Supreme Court and he being a senior lawyer is himself scared of the exposure.

> ... In this case the allegations made against the Second and Third Plaintiffs are true and justifiable and the allegations made against M. Thiruchelvasegaram are justifiable because it has been confirmed by his daughter as matters relevant to the facts in issue.

The respondent by way of paras. 10.7 and 11 of the further re-amended statement of claim aver that both written submissions were also published to the following persons:

(a) the clerk or servant who typed out the submission;

(b) the clerk or servant who translated the submission from English Language to Bahasa Malaysia;

(c) the appellant's brother and sisters.

In respect of the written submission dated 11 October 1993, Dato' Faiza bin Tamby Chik, J, ordered the alleged libel concerning the respondent both in Bahasa Malaysia and English be deleted and expunged whereas in regard to the written submission dated 1 November 1993, the Court of Appeal ordered that the whole of the said written submission be expunged and removed from the court file.

It was pleaded by the respondent by way of para. 10.8 that the appellant uttered and published the said libel so that the respondent's wife would be forced to drop all proceedings brought by her against the appellant, Jega and Suseela for whom the appellant was acting as solicitors in respect of misfeasance, breach of trust and misappropriation monies in connection with Nadchatiram Realities (1960) Sdn Bhd (In Liquidation) and the Estate of Nadchatiram s/o Muthucumaru, deceased.

It was the contention of the respondent that by the statements as pleaded, they meant and understood to mean that the respondent had committed incest with his own daughter – Shanti, and which the respondent vehemently denied.

Though a number of grounds were put forth as defences by the appellant in respect of 1st and 2nd defamation, the learned judge found for the appellant only in respect of absolute privilege. The respondent cross-appealed on this finding. The learned judge considered the absolute privilege in this way.

The appellant claimed that the submissions were made in respect of suit 06. The first written submission is for striking her and the other parties as defendants and the other written submission is in respect of an application by the respondent's wife to expunge those alleged defamatory words in the first written submission.

In considering the issue of absolute privilege accorded to words spoken in the course of any proceeding before any court of law, by *inter alia*, counsel or party the learned judge relied on the passage stated by Lopez LJ in *Royal Acquarium v. Parkinson* [1982] 1 QB 431 at p. 451:

> The authorities established beyond all question this: that neither party, witness, counsel, jury, nor judge, can be put to answer civilly or criminally for words spoken in the course of any proceedings before any court recognised by law and this although the words were written or spoken maliciously, without any justification or excuse, and from personal ill will or anger against the party named.

The learned judge then went on to quote a passage from para. 13.3 of Gatley on *Libel and Slander* (9th edn) that it is immaterial whether such proceedings take place in open court or in private and whether they are final or of a preliminary nature. The rationale for this was expressed by Pigott CB in *Kennnedy v. Hilliard* 10.10 I, CL Rep. (NS) 195 as being:

> founded on public policy, which requires that a judge, in dealing with the matter before him, a party in preferring or resisting a legal proceeding, and a witness in giving evidence, oral or written, in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel.

The learned judge then posed the question – what happens if an advocate and a witness makes a statement of another person, while in the course of legal proceedings, which is false and/or with malice and/or irrelevant? He seemed to have found the answer in the decision of the English Court of Appeal in *Muster v. Lamb* [1883] 1 QBD 588 which announced that no criminal prosecution or civil libel can be maintained against such defendant. This is apparently grounded on public policy and went on to support this proposition by quoting Brett MR in the same case:

> If the rule of law is otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make it a rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included, who have been guilty of malice and misconduct.

However, the learned judge went on to say that it does not mean that there is no prosecution or remedy against such abuses and quoted Lord Mansfield in *Rex v. Skinner* [1772] Lofft 55:

> If the wrong spoken are opprobrious or irrelevant to the case, the court may take notice of them as a contempt and examine on information. If anything of *mala mens* is found upon such enquiry it will be punished suitably.

That might well be so but it does not necessarily as a matter of course that a court may exercise that discretionary power. The better view would be that of the Indian case of *Rahim Badhas v. Bacha Call* [1929] AIR 214 which referred to the passage of Mathew J (the judge of first instance in *Muster v. Lamb (supra)*) which says:

> Words spoken by an advocate in the course of the defence of his client, however, defamatory they may be of the prosecutor, are not actionable, **provided they are relevant to the matter at hand, and spoken in good faith**. (emphasis added).

Mr. Malik, counsel for the respondent, therefore asserted that the rule is with restrictions. No doubt, such view was not adopted by the Court of Appeal in *Muster v. Lamb* but with respect, we are of the view that if there is no restriction that would amount to giving a counsel or a party a carte blanche to make a defamatory statement of a person or party who has absolutely no connection with the proceedings before the court. Surely this cannot be the position and with respect, we disagree with the learned judge on "his view there must be no restriction placed in the way of the principle".

Coming back to the facts in respect of the 1st and 2nd defamation, it is clear to us that the appellant's written submissions were related to resisting suit 06 in which the appellant claimed that it was initiated by the respondent's wife at the instigation of the respondent in view of the alleged commission of incest by the respondent before the filing of suit 06. It was the claim of the appellant that if there was truth in the allegation of fraud etc. why wait for 21 years to file suit 06? At the material time it would appear that the appellant believed the claim of Shanti of the incest committed by the respondent until it was disbelieved by the learned judge at the trial. Though the respondent was not a party to suit 06, the appellant claims, he was very much connected to the filing of it by his wife. In other words, if we understand correctly the object of the appellant in pointing finger at the respondent, it would be for the purpose of showing that the filing of suit 06 was not *bona fide*. In any event the appellant is entitled to do so in order to resist suit 06 and it is relevant to the issue of *bona fide* of suit 06.

On the issue of the written submissions were not ordered to be made by the trial court and the issue of those written submissions in respect of the language used and the order of the trial court to expunge the offending parts, etc we do not propose to deal with them. Suffice for us to say that there are no merits and we agree with the reasons and the conclusion of the learned judge. Similarly, we do not propose to consider the claim of the respondent that the written submissions were published to the staff of the appellant who assisted

in the preparation either by way of typing and translating them before they were tendered to the court was not done within "judicial proceedings" and hence absolute privilege does not apply is amply covered by the learned judge when he relied on *Osboru v. Thomas Boulter* [1930] 2 KB 226.

In the circumstances we agree with the learned judge's finding that however defamatory the contents of those written submissions (some of which tend to go overboard) of the respondent may be, they are protected by absolute privilege. In view of our finding affirming the decision of the learned judge, the cross-appeal by the respondent fails.

3rd Defamation

The learned judge found as a fact that when the appellant uttered the alleged defamation on 12 October 1993 at the court house at Seremban High Court the court at the material time was not in session. The words that the appellant maliciously and falsely uttered were:

> The several actions were brought by Vishi's husband to cover-up the incest committed by Segaram with Shanti. ("Vishi", the plaintiff explained, is the family name of his wife Vijayalaksmi and "Segaram" is himself).

The learned judge further found that those words were in fact uttered by the appellant and at the material time when those words were uttered the learned judge was in his chambers conducting chamber proceedings. This is borne out by the record of the learned judge's note book (p. 5904 of the Appeal Record). There was no evidence to the contrary by the appellant. Hence those words were not uttered in the course of legal proceedings. The learned judge concluded:

> The evidence of the plaintiff and Satha to what took place on that day (meaning 12.10.93) are convincing as compared to those advanced by the defence.

The learned judge, in our view, is the best person to evaluate the evidence of both parties before him and we are in no position to disagree or quarrel with his evaluation. *(Fusing Construction Sdn Bhd. v. Eon Finance Berhad & 2 Ors. (and Another Appeal) supra.*

The learned judge further held that absolute privilege could not be relied on by the appellant in respect of a defamatory statement made by counsel outside the court room with reference to the proceedings. He relied on the proposition at para. 13.3 of Gatley's 9th edn on *Libel and Slander* which cited two American cases – *Demopolis v. Peoples National Bank* 769 p. 2nd 426 (Wash. 1990) and *Dashtgard v. Blair* [1990] CCLT (2nd) 284. The learned judge further was of the view that the proposition must include situation where the defamation is made in a court room when no proceedings is in session which is the case here. We agree.

Appellant apparently relied on the third category of privilege referred to by Devlin LJ in *Lincoln v. Daniels* [1962] 1 QBD 237 and then went on to paraphrase the words of Earl of Halsbury LC in *Watson v. M'Ewan* [1905] AC 480 at p. 487. We have examined those words at p. 487 and with respect, the paraphrasing was made out of context – those words refer to statements by witnesses to a solicitor. This is what Earl of Halsbury said at p. 487:

> It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice – namely, the preliminary examination of witnesses to find out what they can prove. It may be that to some extent it seems to impose a hardship, but after all the hardship is not to be compared with that which would arise if it were impossible to administer justice, because people would be afraid to give their testimony.

The statement uttered by the appellant was really an outburst to defame the respondent and the appellant could not rely on qualified privilege or absolute privilege for the reasons stated.

On the issue of the pleadings at para. 10 of the amended statement of claim of words "like those" as raised by the appellant, we are of the view, it is covered by para. 32.13 of Gatley on *Libel and Slander* (9th edn). Further, the Federal Court in *Hassan & Anor v. Wan Ishak & Ors.* [1961] 27 MLJ 45 held under (2):

> Although the actual words used in the language in which they were used should have been pleaded the failure to do so could not be held to have been fatal to the case of the plaintiffs. At the trial it was sufficient to prove words that were substantially the same.

For the reasons stated, we find no grounds to disagree with the learned judge's finding on this 3rd defamation.

4th Defamation

This alleged 4th defamation arose out of a letter dated 12 November 1993 written by Jega to Satha, solicitor of Vijay with the following warning:

> Please also take notice that the Defendant will be calling Nadchatiram s/o Thiruchelvasegaram and Satharuban Sivasubramaniam as his witnesses at the trial whom I believe with be able to give material evidence of an allegation on incest which evidence are relevant to prove the motive behind this suit.

The respondent alleges that the appellant falsely and maliciously, in furtherance of a concocted common plan, directed and instigated Jega, for whom the appellant was his solicitor, to send the said letter to Satha. Hence by those words, the respondent claims, meant and is understood to mean that he has committed incest with his daughter, an allegation which is false.

The learned judge was of the view that this 4th defamation is more for the tort of conspiracy rather than defamation. He therefore considered the tort of conspiracy separately in his judgment when he awarded a sum of RM500,000. He came to such view on the premise that this 4th defamation is brought under the cause of action for defamation due to the belief of the respondent that the tort of conspiracy merges with the tort of defamation, possibly being influenced by the judgment of the judge of first instance in *MGG Pillai v. Tan Sri Vincent Tan Chee Yioun* [1995] 2 CLJ 912 at p. 924, where Mokhtar, J, said:

> As I have stated earlier there appears to be relativeness, a linkage and a common sting between those two articles. The articles by the second and third defendants are on the same issues and the articles written by the fourth and fifth defendants are also of the same issues though different from the articles of the second and third defendants. It appears to me that there has been a concerted agreement between and among the defendants of a predominant intention to injure and damage the plaintiff's personal and commercial reputation and personal career by the publication of the four defamation articles in question which in fact has caused irreparable injury, harm and damage to the plaintiff This is the common link in all the four articles. Hence, applying the principle in the case of *Ward v. Lewis* [1955] 1 All ER 55; [1955] 1 WLR 9, the tort of conspiracy merges with that of the tort of defamation.

The learned judge seemed to take such view after a careful reading of *Ward v. Lewis.* However, the judgment of the judge of the first instance in applying the principle in *Ward v. Lewis* on conspiracy issue was approved on appeal when Gopal Sri Ram, JCA, said at p. 925 "That, in my judgment, is a proper direction in law and upon the proved facts. Conspiracy is not always capable of proof by direct evidence." (*MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [1995] 2 CLJ 912).

With respect, we disagree with the learned judge's view that the 4th defamation is more for the tort of conspiracy. Be that as it may, we will consider whether the said letter constitutes defamation as alleged by the respondent.

Firstly, the said letter was written by Jega and there was no evidence to show that it was written at the instigation of the appellant. There was therefore no nexus.

Secondly, looking at the said letter even if at the instigation of the appellant, it was a notice to the solicitor for the opposing party that certain witnesses, including the nature of their evidence to be adduced, will be called at the pending proceeding filed by respondent's wife, Vijay. In our view, such a case would come within the same situation as in 1st and 2nd defamation, that is, absolute privilege is available as a defence (see *Munster v. Lamb, supra*). It is one of the defences open to the appellant in view of the principle that the tort of conspiracy merges with that of the tort of defamation. On the merger issue, Denning LJ in *Ward v. Lewis, supra*, said at p. 56:

> But counsel for the plaintiff says that on the conspiracy allegation it is only necessary to allege conspiracy to injure or to do an unlawful act and then to allege damage without alleging the connection between the two. I cannot agree. It is important to remember that when a tort has been committed by two or more persons an allegation of a prior conspiracy to commit tort adds nothing. The prior agreement merges in the tort. A party is allowed to gain an added advantage by charging conspiracy when the agreement has become merged in the tort.

Though the learned judge was of the view that the 4th defamation is more for the tort of conspiracy based on the pleadings of the respondent for which we respectfully disagree, but for the reasons stated by us, the respondent fails on this 4th defamation.

We will consider the conspiracy issue as a separate tort as did the learned judge on the premise that the learned judge was right in his view later in this judgment.

5th Defamation

It is in respect of a letter dated 2 September 1995 by the appellant's firm addressed to the respondent's firm. It is stated as follows:

> Our client (the defendant) further wishes to inform you (the plaintiff) that it is your daughter who goes round making allegations against you and in fact she wanted to lodge a police report against you and our client stopped it. Our client states that she is very embarrassed that you are a source of disgrace to the family and to her and she wonders how you manage to walk around and our client has even stopped taking cases and going to Court because of you. You were a source of embarrassment in London and you are now continuing it here and further her tuition money was used by Vijayalakshimi to clothe and educate you in London. Our client wants you to take the Meharabat and read it. Our client feels that you are a reincarnation of Duryodhana who was so lustful and greedy that the whole of the Kuru dynasty was destroyed. Similarly your whole family will be destroyed.
>
> Please go to the temple and start praying. There is no smoke without fire.

The above letter was received by the respondent firm's fax machine. It came through fascimile. Kong Foo Sang (PW5), a clerk with the respondent's firm found it in the respondent firm's fax machine and PW5 read it and so did the respondent's two other staff in the firm as well as Vijay, the respondent's wife.

The respondent contended that those words in the said letter meant that he has committed incest or a serious sexual crime, being lustful, mean, cruel, wicked, dishonest, a pauper and not fit to be a practising lawyer and that his entire family will be destroyed.

We accept the finding of fact of the learned judge that it was the appellant who sent the said letter *via* facsimile to the respondent's firm and that the said letter was read by the respondent's staff. We are, however, not clear what prompted the appellant to write such a letter as it was not so stated by the learned judge. According to the appellant's submission, it was a reply to Segaram's allegation in his firm's letter to her of 29 August 1995 and that she was entitled to publish her reply to the firm and not Segaram personally. She therefore claims that it would have been in the ordinary course of business for clerks in Segaram's firm to see correspondence that arrived at the firm and hence ancillary qualified privilege attaches to the publication to Kong Foo Sang (PW5).

The learned judge seemed to take the view that a letter sent by fax to a legal firm and without any indication that it is solely for any particular person runs the risk of it being read by other members of the receiving firm. Relying on the authority of the *Duke of Brunswick v. Harmer* [1849] 14 QB 185 he held the appellant liable for the publication to the respondent's firm. We are, however, of the view that the facts in Brunswick are different from the facts of this case.

The preferred view is what is stated in *Halsbury's Laws of England* (4th Edition Reissue, Vol. 28) at para. 118 of p. 61 under the Caption "Protection of publications incidental to privileged communications":

> A person may take all reasonable steps to make a privileged communication to another, which may include publication to other persons in the ordinary course of business. For instance it is reasonable and usual course to dictate business letters to a typist, even if those letters may contain defamatory statements and it may be reasonable to send a defamatory letter which is likely to be opened by the addressee's secretary. In such cases, an "ancillary" qualified privilege is said to apply. The doctrine also covers publication to the defendant's typist or the plaintiff's secretary of defamatory communications about the plaintiff himself, which are non-actionable rather than privileged.

In our view, the learned judge failed to consider that it was a communication between the appellant's firm and the respondent's firm as contended by the appellant and is in the ordinary course of business and the publication to the respondent's staff including PW5 would come within 'ancillary' qualified privilege. According to Lord Denning, MR, in *Bryanston Finance Ltd. v. de Vries* [1975] 2 All ER 609 at p. 616 the privilege protecting publication to a typist is original and not ancillary to the privileged publication to the addressee of the letter dictated.

In the circumstances, the appellant succeeds to show that such publication would come within "ancillary qualified privilege or privileged publication or non-actionable". The respondent fails and the learned judge's finding in favour of the respondent cannot be supported or upheld.

6th Defamation

This 6th defamation is in respect of the remarks endorsed on the letter of the respondent dated 5 September 1995 demanding an apology from the appellant and withdrawal of the offending words in her letter of 2 September 1995 to the respondent's firm. The remarks were made by Shanti at the instigation of the appellant as stated by PW5 and accepted by the learned judge. The remarks are:

> I, Shanti (K/P: 69096-10-5388) shall give evidence against your client and lodge a police report in due course.
>
> Sgd: Shanti and a
> thumb print affixed.

Counsel for the appellant submitted that in the above remarks, nowhere was allegation of incest made. It might well be so but those remarks could not be read in isolation. Be that as it may the learned judge held the appellant liable on the same basis as the 5th defamation – publication to the staff of the respondent. As we held that such publication would properly come under privileged publication and non-actionable, the respondent fails on this 6th defamation and we cannot therefore uphold the learned judge's decision.

7th Defamation

As a result of the events under the 5th and 6th defamation, the respondent proceeded to file suit 04. After the sealed copy of the writ was extracted PW5 served it on the appellant on 22 February 1997. Instead of the normal practice of affixing her signature at the rear of the serving copy, the appellant, according to PW5, wrote and while writing, read out aloud to her staff present the following:

Segaram,

I am not your enemy but your friend. I have not read your summons, it is most unfair for you to chase and harass me continuously since London days in 1960's – that time you wrote to complain about me going out with white boys to my parents and now you keep chasing me.

According to the respondent, those words give the impression that he is a womaniser, lustful, immoral and mean; that he is a busy-body, a trouble maker and unfit to be an advocate and solicitor.

Besides claiming the defamatory publication to the respondent's staff and PW5 the respondent avers that such remarks will be read by the Honorable Judges, registrars and staff of the High Court since this copy of the writ will be exhibited in the affidavit of service as proof of service.

We accept the learned judge's finding of fact and the evidence of PW5 on this aspect. We accept the learned judge's finding that the publication therein is not only made to the staff of the respondent but extends to the judges etc for the reasons stated by him. In our view, therefore the defence of privileged publication does not extend to the appellant under this 7th defamation. For the reasons stated by the learned judge, we agree that the defenses of justification, fair comment and public interest does not cover the appellant's liability to the respondent for the libel. These words have nothing to do with the writ served on her.

8th Defamation

In response to the statement published in respect of the 7th defamation, the respondent through his solicitor wrote a letter dated 24 February 1997 to the appellant personally to demand withdrawal of the said statement and to apologise. This letter was sent personally to the appellant by PW5 on 24 February 1997. PW5 then saw the appellant writing on the acknowledgment copy:

I will fix you up,

PW5 testified that while writing the above, she read it out loud in the presence of her staff, Shanti and PW5 himself. She then made Shanti to sign beneath the message.

Besides the above, the appellant also wrote on the same document, the following:

You have been playing havoc and your threats will be exposed in court,

I prepared to ahead and fight and prove all the allegations.

She signed beneath it.

Again, on the same footing the respondent claims the statements are defamatory of him.

We agree with the learned judge's acceptance of the evidence of PW5 of what transpired for the reasons stated by him. He went on further to state that even if the first statement was written by Shanti as claimed by the appellant she is not exempted from liability for "If one repeats, and another writes the libel, and a third approves what is written they are all makers of it: for all persons who concur, and show their assent or approbation to do an unlawful act, are guilty" *per curiam* in *R v. Paine* [1696] 5 Mod. @ p. 167 and applied in *Lawson v. Burns* [1976] 6 WLR @ 369.

We agree with the learned judge that the words taken in the light of the circumstances mean and meant to mean what the respondent claims in his amended statement of claim. However, the learned judge only considered the defence of fair comment wherein, according to him, the absence of public interest disqualifies the appellant from liability.

However, in our view, the learned judge should have considered that the publication was made to PW5 and the respondent's solicitors and it was and should be under the ordinary business in which case privileged publication is available to the appellant and hence it is non-actionable.

In the circumstances we are of the view that the learned judge erred in his finding and we therefore rule in favour of the appellant.

9th Defamation

The respondent alleged that the statutory declaration dated 4 May 1994 made by Shanti was falsely and maliciously "prepared, dictated and approved" by the appellant in collusion with Jega. They "directed, procured and instigated" Shanti to affirm it. It relates to her withdrawal of writ No. S5-22-562-93 and the allegations of incest against her father, the respondent.

The statutory declaration of Shanti was used by the appellant and those whom she conspired with as an exhibit on six occasions in legal proceedings and once in an advocate and solicitor board action against the appellant.

The learned judge found that the appellant did not direct Shanti to make the statutory declaration nor did she force Shanti to affirm such statutory declaration. He gave his reasons. There are no grounds for us to disagree with his finding and conclusion. As we agree with the learned judge's decision, the respondent fails in his cross appeal on the 9th defamation.

Conspiracy

The learned judge considered the tort of conspiracy separately in the belief that the 4th defamation does not merge with the tort of conspiracy. As a result he was of the view that the appellant fails as she relied on the various privileges as her defence which are good for defamation but not for conspiracy.

As stated earlier, following *Ward v. Lewis* and adopted by the learned judge in *MGG Pillai v. Tan Sri Vincent Tan Chee Yioun* and affirmed by this court ([1995] 2 CLJ 912 at p. 924) we are of the view that the learned judge erred in law in considering the tort of conspiracy separately.

In any event, even if the learned judge could properly consider the tort of conspiracy as a separate issue, he has not, in our view, given sufficient consideration on the law of conspiracy apart for relying on *Halsbury Laws of England* 4th edn (reissued) @ para 64 and the distinction expressed by Lord Parker in *Gulf Oil Ltd. v. Page* [1987] 1 Ch. 327.

The other essential point that the learned judge missed is that actual damage is an essential ingredient in the tort of conspiracy. This is amply illustrated by *Ward v. Lewis* in which an amendment to plead special damage flowing from the conspiracy was necessary to maintain the cause of action.

This principle, according to counsel for the appellant, is restated by the Court of Appeal in *Lourho v. Fayed (No. 5)* [1993] 1 WLR 1489 where at p. 1494, Dillion LJ said:

> A plaintiff in a civil action for conspiracy must prove actual pecuniary loss, ...

Evans LJ in the same case at p. 1507, stated:

> The essential facts are, first a combination between the defendant and others; second, with the sole or predominant object of causing injury to another person; and third, damage in fact so caused.

The learned judge awarded a sum of RM500,000 to the respondent under the tort of conspiracy for damage to "the plaintiff's profession". In other words, the award was for general damages for injury to reputation – which is not permissible in a claim for the tort of conspiracy. In this respect the House of Lords in *Gregory v. Portmouth Council* [2000] 1 All ER 560 in dealing with tort of conspiracy quoting with approval the Court of Appeal case of *Lourho v. Fayed (No. 5)* 1 All ER 188, [1993] 1 WLR 1489 through Lord Steyn said at p. 570:

> The third tort is conspiracy. Having regard to the way in which the case has been pleaded this may have been an alternative remedy. But this tort does not allow for the recovery of injury to reputation or injury to feelings.

It was the appellant's contention that such an award, in any event was without any basis as the respondent produced no evidence of such loss. It would appear that the figure was an arbitrary one.

We agree with the submission of the appellant and in the circumstances we cannot agree with the learned judge's finding and conclusion including the award of RM500,000.

Conclusion

For the reasons stated, we hereby make the following orders on liability:

We affirm the order of the learned judge dismissing the 1st, 2nd and 9th defamation.

We affirm the order of the learned judge in holding the appellant liable for the 3rd and 7th defamation.

However, the order of the learned judge in respect of the 5th, 6th and 8th defamation as well as the tort of conspiracy (including the award of RM500,000) is set aside. We further order that the 4th defamation fails.

In other words, the appeal of the appellant is allowed in part to the extent as set out above and the cross-appeal of the respondent is dismissed with costs.

We will now proceed to consider what should be the appropriate damages to be awarded to the respondent in respect of the 3rd and 7th defamation.

In considering an award for damages for defamation, we are guided by the long established factors as set out by the Federal Court in *MGG Pillai*'s case as was followed by the learned judge. They are:

1. The position and standing of the plaintiff.
2. The extent of the publication.
3. The mental distress, hurt, anxiety and mental anguish caused to the plaintiff as a result of the libel.
4. The uncertainty undergone in the litigation.
5. The conduct of the defendant from the time of the libel down to the very moment of the verdict.
6. The absence and refusal of correction, retraction or apology.

In our view the extent of the publication is one of the relevant factors. In this case the defamation was confined to a small circle of people, that is, the court staff and those present in the Seremban High Court. It was not a publication to the public at large. We agree that the allegation of incest against the respondent was a serious one and certainly would have caused distress etc to the respondent as a result thereof. However, we were advised that there was an atttmpt to settle but unfortunately failed possibly because of the strong personalities of the parties. Be that as it may, as stated earlier in this judgment, the root cause of all the problems is the squabbles amongst the siblings of the deceased over the distribution of the properties left by their deceased father.

Taking into account of the circumstances of the case and the relevant factors, we will make an award of RM500,000 as damages to the respondent in respect of the 3rd and 7th defamation. We think this figure is sufficient to compensate the respondent for the damage caused and he had been fully vindicated by the decision of the court on the alleged incest by him on his daughter. The order of the learned judge in respect of the damages is hereby set aside and substituted with a sum of RM500,000.

In respect of costs, we order that the costs of this appeal, the other two appeals referred to earlier in this judgment and the two applications relating to this appeal to the respondent. We also order the deposits to the respondent towards his taxed costs. The appellant will, however, have the costs of the cross-appeal.